

**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2004-076

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XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

AUTHOR: Andrews, J.

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was docketed on March 9, 2004, upon the BCMR's receipt of the application.

This final decision, dated December 29, 2004, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to correct his military record to show that he was selected for promotion to commander (CDR) by the inactive duty promotion list (IDPL) CDR selection board that met in 2003 and to backdate his date of rank to what it would have been had he been selected for promotion by that board, instead of by the IDPL CDR selection board that met in August 2004.

The applicant alleged that in 2003, he should have had the option of being considered for promotion by the IDPL CDR selection board. Instead, he was required to compete for promotion on the active duty promotion list (ADPL). He alleged that this requirement placed him at a great disadvantage because Reserve officers are unlikely to be selected for promotion when they have to compete with regular officers.

The applicant stated that in 2003 he was serving on extended active duty (EAD). He alleged that other Reserve officers' EAD contracts included the following language, which was unfairly and for unknown reasons left out of his own EAD contract:

If you desire to compete on the IDPL vice ADPL, you may submit a written request to Commander, Coast Guard Personnel Command, to be released from EAD during the time frame that both the ADPL and IDPL boards meet. Your request must be received no later than 01 May of the promotion year in which you will be considered. After both boards adjourn, you will resume your EAD contract.

The applicant pointed out that on the IDPL, his signal number was 306, and the Reserve officers whose signal numbers were 305 and 307 both got to compete on the IDPL in 2003 and were both selected for promotion. He submitted copies of Coast Guard bulletins confirming this information.

In support of his allegation, the applicant also submitted an email message from LCDR S, chief of the Reserve Officer Management division of the Coast Guard Personnel Command (CGPC). LCDR S stated in the email on February 12, 2004, that “[y]ou should be afforded the opportunity to compete on the IDPL. The information on how to effect this should have been included in your recall to active duty orders paragraph 7.a.” He also submitted a copy of another Reserve officer’s active duty orders, paragraph 7.a. of which contains the same language as that in the block quotation above.

SUMMARY OF APPLICABLE MILITARY RECORDS

On March 28, 2002, the applicant, a LCDR in the Reserve, received assignment orders recalling him to active duty. At the time, he had more than 12 years of prior active service in the regular Coast Guard and more than 13 years of service in the Reserve. Paragraph 6 of the orders reads as follows:

This recall transfers you from the inactive duty promotion list (IDPL) to the active duty promotion list (ADPL). You will be placed in zone on the ADPL according to your date of rank. During the period of this recall, you *are expected* to be in zone for promotion to commander in July 2002. If selected for promotion under a best-qualified criterion on the ADPL, you will be offered the opportunity to integrate and remain on active duty as a permanent regular officer. If you do not desire to integrate you will be released from active duty (RELAD) at the completion of your contract. If not selected for promotion, you would carry the non-selection status to the IDPL. Because you exceed the criteria specified in article 1.B.2. of [the Personnel Manual], you are ineligible to apply for a contract extension via the Reserve Extension Board. However, you may apply for a waiver – which will be considered solely on the prevailing service need.

On April 3, 2002, the applicant signed a two-year extended active duty (EAD) contract. Because of a smaller than expected zone size, he did not fall in the zone for promotion to CDR in July 2002, contrary to the indication in his orders. However, in July 2003, the applicant was considered for promotion by the ADPL CDR selection board. He was not selected or promotion. In 2004, the applicant was released from his EAD early and competed for promotion to CDR on the IDPL. He was selected for promotion and then returned to EAD.

VIEWS OF THE COAST GUARD

On May 28, 2004, the Judge Advocate General (TJAG) of the Coast Guard recommended that the Board deny the requested relief. In so doing, TJAG “adopt[ed] the facts and analysis” provided by CGPC, which he attached to his advisory opinion.

CGPC stated that in January 2002, the applicant requested an EAD contract. His request was approved. CGPC stated that he was recalled to active duty under the authority of 10 U.S.C. §§ 12311 and 12312. CGPC also stated that 14 U.S.C. § 41a. “requires that a reserve officer on an active duty agreement shall be placed on the ADPL in accordance with his grade and seniority.” Therefore, CGPC stated, the applicant’s orders properly stated that he would be placed on the ADPL.

CGPC stated that in June 2002, another officer on an EAD asked CGPC if he could break his contract so that he could compete on the IDPL instead of the ADPL. His request was approved, and he resumed EAD after both the IDPL and ADPL CDR selection boards adjourned.¹ In July 2002, three months after the applicant signed his EAD contract, CGPC “started to incorporate new verbiage in all EAD orders indicating that an officer may submit a written request to be released from EAD during the timeframe that both the ADPL and IDPL boards meet for the purpose of competing on the IDPL.”² CGPC stated that over the last few years, “several requests to terminate contracts early to compete on the IDPL have been approved. However, many reserve officers want to compete on the ADPL since selection by an ADPL ‘best qualified’ board allows a reserve officer to integrate as a regular, permanent officer.” CGPC stated that the applicant could have requested to compete on the IDPL but did not do so.

CGPC noted that in signing his EAD in April 2002, the applicant was guaranteed to remain on active duty until he could secure an active duty retirement at age 53 because in October 2002, he “attained 18 years of credible active service ... while on his EAD contract. That guaranteed that he could not be involuntarily separated from active duty, unless the Secretary approve[d] the release, until he became eligible for an active duty retirement after completing 20 years of credible active service.” CGPC alleged that

¹ The BCMR staff asked TJAG under what legal authority this officer was released early from his EAD contract just to compete on the IDPL. TJAG cited Article 12.A.7. of the Personnel Manual, which provides that “Commander, (CGPC-opm) will approve a request for release to inactive duty (RELAD) or early release from a Reserve officer who has not fulfilled his or her active duty obligation only under the conditions listed below. Reserve officers serving under an active duty agreement normally must complete the period of active duty specified by the agreement. ... 2. When the needs of the Service clearly would be served by approving the request.”

² The BCMR staff asked TJAG how this opportunity to compete on the IDPL under Article 12.A.7. was advertised to Reserve officers on EAD prior to July 2002. TJAG responded only by stating that it was included in EAD contracts beginning in July 2002. TJAG did not explain how a Reserve officer could know prior to July 2002 that a request to break an EAD contract to increase one’s chance of promotion might be deemed to clearly serve the needs of the Service, as required under Article 12.A.7.

if the applicant had sought to end his EAD in order to compete on the IDPL, "he could have risked losing this guarantee and, consequently, would have to wait until age 60 before receiving reserve retirement pay."

Moreover, CGPC stated that when the applicant became "in zone" for promotion to CDR in 2003, he sent an email to CGPC in which he wrote that he looked forward to competing on the ADPL CDR selection board in August 2003 and that "[o]nly after he was not selected for promotion did he express a desire to compete on the IDPL." CGPC noted that the applicant would be able to compete on the IDPL in 2004 as an "above zone" candidate. CGPC submitted copies of an email conversation, dated July 22, 2003, between Lieutenant T, the chief of the Promotions Section for officers at CGPC, and the applicant. Lieutenant T began the exchange by sending the applicant the following email message:

We are preparing for the ADPL and IDPL boards. We sent you a contract recalling you to EAD, but we never received a copy of that contract up here for your Headquarters' record. Please fax a copy of your contract to [number omitted]. As of right now, you are scheduled to be seen by the ADPL. Please either verify this or let me know otherwise.

On the same day, the applicant responded to Lieutenant T as follows:

I dropped a copy of the signed contract off in CGPC on 03 April 2002. I will fax a copy to your ASAP.

I look forward to competing on ADPL board meeting 04 August.

TJAG argued that the "evidence offered by Applicant is insufficient to overcome the presumption of regularity afforded the Coast Guard." TJAG noted that the applicant "was treated in accordance with standard policy" and that he "was content with competing on the ADPL" until he failed of selection.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 7, 2004, the applicant responded, disagreeing with the Coast Guard's recommendation and objecting to the suggestion that he manipulated the situation. The applicant stated that he was only content to compete on the ADPL because he was advised that it was a legal requirement. He alleged that he was never advised of the option to compete on the IDPL until after he failed of selection on the ADPL. He argued that this important option should not have been limited to those "in the know" but should have been publicized to all Reserve officers on EAD. He alleged that, if he had been advised of the option to compete on the IDPL, he would have taken it despite the "risk" to his retirement date alleged by CGPC.

The applicant alleged that his point of contact on all EAD issues was Lieutenant T at CGPC and that “[i]n July 2003 when I asked about the upcoming [CDR] promotion boards, he stated that I had no option but to compete on the ADPL board.” He stated that only later, after being told this, did he tell Lieutenant T that he was looking forward to competing on the ADPL.

The applicant stated that he would compete on the IDPL in 2004 but is able to do so only because he has become aware of the option informally. He alleged that CGPC had yet to publicize the option for Reserve officers on EAD to break their contracts and compete on the IDPL.

On August 23, 2004, the applicant notified the Board that he has been selected for promotion by the IDPL CDR selection board that convened on August 2, 2004. He asked the Board backdate his date of rank to July 1, 2004, which is the date he would have been promoted to CDR if he had been selected for promotion in 2003.

APPLICABLE LAW

Under 14 U.S.C. § 41a(d), which concerns the ADPL, “[a] Reserve officer, other than one excluded by subsection (a), shall, when he enters on active duty, be placed on the active duty promotion list in accordance with his grade and seniority. The position of such a Reserve officer among other officers of the Coast Guard on active duty who have the same date of rank shall be determined by the Secretary.”

Under 14 U.S.C. § 728(a), which concerns the promotion of Reserve officers on the IDPL, a “Reserve officer on active duty, other than for training, duty on a board, or duty of a limited or temporary nature if assigned to active duty from an inactive duty status, shall not be eligible for consideration for promotion under this subchapter [14 U.S.C. §§ 720 et seq.]; but shall be considered for promotion under chapter 11 of this title [14 U.S.C. §§ 211 et seq.].”

Article 5.A.1.c. of the Personnel Manual states that, “[p]ursuant to 14 U.S.C. 728, Reserve officers serving on extended active duty agreements under 10 U.S.C. 12301 shall be considered for promotion by the appropriate ADPL selection board.”

Chapter 7.A.3.b. of the Reserve Policy Manual states that a “Reserve officer on active duty, other than for training, duty on a board, or duty of a limited or temporary nature (i.e. ADSW, involuntary recall or ADHC), if assigned to active duty from an inactive duty status, shall not be eligible for consideration for promotion on the IDPL (14 U.S.C. 728(a)).”

Chapter 3.B.7.b. of the Reserve Policy Manual provides that

Once a reservist commences duty, that duty is no longer voluntary. A reservist who needs to leave active duty before the planned termination date due to unavoidable conflict must obtain approval for any changes from the appropriate supervisor. Should an unavoidable conflict occur, possible solutions include amending the orders to become non-consecutive or terminating the orders and rescheduling the remaining duty under a new set of orders. Requests for amendments or early termination of orders shall be submitted immediately to the servicing ISC (pf).

Chapter 3.B.7.c. of the Reserve Policy Manual states that “[c]onditions for early termination of EAD or RPA contracts can be found in Chapter 12, Personnel Manual, COMDTINST M1000.6 (series).”

Article 12.A.7. of the Personnel Manual 12.A.7., titled “Releasing Reserve Officers to Inactive Duty,” states that

Commander, (CGPC-opm) will approve a request for release to inactive duty (RELAD) or early release from a Reserve officer who has not fulfilled his or her active duty obligation only under the conditions listed below. Reserve officers serving under an active duty agreement normally must complete the period of active duty specified by the agreement.

1. When a specific program for early releases applicable to all Reserve officers within a group has been approved.
2. When the needs of the Service clearly would be served by approving the request.
3. When a hardship of extreme degree exists which the officer’s early release can alleviate.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.
2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.
3. The applicant alleged that his consideration by the ADPL CDR selection board in 2003 was in error and that his EAD contract should have contained language allowing him to compete on the IDPL. However, the record indicates that he was placed on the ADPL and competed for promotion there in accordance with statute,³

³ 14 U.S.C. §§ 41a and 728.

regulation,⁴ and the terms of his contract. Although in July 2002, the Coast Guard began including language in EAD contracts to notify reservists of the potential opportunity to compete on the IDPL by requesting release from EAD, in light of the clear requirements of the law, the Board finds that the Coast Guard did not err in placing the applicant on the ADPL and having his record considered by the ADPL CDR selection board.

4. The Board, however, is not limited to correcting legal errors in members' records, but may also remove injustices. "Injustice" is "treatment by the military authorities that shocks the sense of justice, but is not technically illegal."⁵ The BCMR has "an abiding moral sanction to determine insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief."⁶

5. The applicant has proved that he and, presumably, many other Reserve officers on EAD have been treated significantly differently from those who have signed their EAD contracts since July 2002 and from at least one Reserve officer who, like the applicant, signed his EAD contract before July 2002.⁷ In essence, these other officers were all informed by the Coast Guard that CGPC had determined that allowing a Reserve officer to break his EAD contract to give him a better chance for promotion (by competing on the IDPL) "clearly" serves the needs of the Service and is therefore permissible under Article 12.A.7. of the Personnel Manual. Previously, CGPC had required Reserve officers on EAD to compete for promotion on the ADPL in accordance with statute and regulation. However, in June 2002, CGPC apparently reinterpreted the needs of the Service without amending Article 12.A.7. or otherwise advertising this change of policy. Therefore, just as the applicant alleged, in the summer of 2003, a Reserve officer who had been on EAD for at least one year had to be especially "in the know" to take advantage of CGPC's new interpretation of the needs of the Service under Article 12.A.7.

6. By informing certain Reserve officers of the chance to break their EAD contracts in accordance with the new interpretation of Article 12.A.7. and compete for promotion on the IDPL, while leaving others in the dark, the Coast Guard in essence created a secret access to another, presumably easier "playing field"⁸ (the IDPL). The

⁴ Coast Guard Personnel Manual, Article 5.A.1.c.

⁵ See *Reale v. United States*, 208 Ct. Cl. 1010,1011 (1976); Decision of the Deputy General Counsel, BCMR Docket No. 2001-043.

⁶ *Caddington v. United States*, 178 F. Supp. 604, 607 (Ct. Cl. 1959).

⁷ In his memorandum on the case, Commander, CGPC, stated that in June 2002, another officer on EAD asked CGPC if he could break his contract so that he could compete on the IDPL instead of the ADPL. His request was approved, and he resumed EAD after both the IDPL and ADPL CDR selection boards adjourned.

⁸ *Berkley v. United States*, 287 F.3d 1076, 1089 (Fed. Cir. 2002); *Baker v. United States*, 127 F.3d 1081, 1086 (Fed. Cir. 1997) (noting the importance of creating a "level playing field" for officers competing for

Board finds that CGPC's actions in this regard were negligent of the trust and spirit of fair play that are vital to the military promotion system. The Board recognizes that as the needs of the Service change, interpretations of regulations such as Article 12.A.7. may change. However, the Board finds that CGPC's apparent actions in changing this significant policy without informing all Reserve officers on EAD who were eligible to take advantage of it constitute "treatment by the military authorities that shocks the sense of justice, but is not technically illegal."⁹

7. In light of this apparent injustice, the applicant asked the Board to remove his failure of selection in 2003 and backdate his date of rank to what it would have been had he been selected for promotion by the IDPL CDR selection board that met in 2003. However, the applicant neither alleged nor proved that if he had been permitted to break his EAD contract to compete on the IDPL in 2003, he would have been selected for promotion by that board. Under *Engels v. United States*, 678 F.2d 173, 176 (Ct. Cl. 1982), the Board must apply "two separate but interrelated standards" before it can remove the applicant's failure of selection and backdate his date of promotion. First, the Board must determine, as it has determined in this case, that the applicant's "record has been prejudiced by errors." Second, the Board must determine whether, despite that prejudice, it is "unlikely that he would have been promoted in any event." The *Engels* court held that in such a case, the applicant "must make a prima facie case" that he would have been promoted absent the prejudicial error, "but the end-burden of ultimate persuasion lies with [the Coast Guard] to show the improbability of [the applicant's] selection even if his record were untainted." *Id.* at 177. The record now before the Board is silent as to this second standard. Given the silence of both the applicant and the Coast Guard on this aspect of the case, the Board is unable to reach a conclusion.

8. Accordingly, the applicant's request for correction should be denied but without prejudice. If he reapplies to the Board for the same relief and addresses the issues identified in finding 7 above, the Board will grant further consideration.

promotion).

⁹ See *Reale* at 1011 (1976); Decision of the Deputy General Counsel, BCMR Docket No. 2001-043.

ORDER

The application of xxxxxxxxxxxxxxxxxxxx, USCGR, for correction of his military record is denied without prejudice.

Jordan S. Fried

Richard Walter

Suzanne L. Wilson